Commentary: Appellate Court Cases

Pope v. Lunday, No. 20-6003, 2020 U.S. App. LEXIS 36618 (10th Cir. Nov. 20, 2020)

Other Tenth Circuit Cases

Takeshi Ogawa v. Kyong Kang,
946 F.3d 1176 (10th Cir. 2020)

Watts v. Watts,
935 F.3d 1138 (10th Cir. 2019)

West v. Dobrev,
735 F.3d 921 (10th Cir. 2013)

Leser v. Berridge,
668 F.3d 1202 (10th Cir. 2011)

Navani v. Shahani,
496 F.3d 1121 (10th Cir. 2007)

de Silva v. Pitts,
481 F.3d 1279 (10th Cir. 2007)

Shealy v. Shealy,
295 F.3d 1117 (10th Cir. 2002)

Ohlander v. Larson,
114 F.3d 1531 (10th Cir. 1997)

Habitual Residence of Infants | Lack of Necessity of Evidentiary Hearing

When a district court found that the United States was the habitual residence of twin children born there, despite an alleged agreement between the parents that the children would be raised in Brazil, the father appealed.

Holdings

When reviewing a dispute over a child's habitual residence, the court need only decide whether the child is the habitual resident of the country claimed by the petitioner. Evidentiary hearings are not a matter of right in Hague Convention cases.

Facts

The mother become pregnant with twins while living with the father in Brazil. When she was about twenty weeks pregnant, she moved to Oklahoma and ended her relationship with the father. After the twins were born, she stayed in Oklahoma. The father filed a petition for "return" of the children to Brazil. He argued that when the children were in utero, the mother had agreed that the family would raise the children in Brazil, and he argued that she could not unilaterally change this shared intent. While conceding that the children were not removed from Brazil, the father argued that the children were nonetheless being wrongfully retained in the United States. The mother argued that the children could not be habitually resident in a country where they had never lived.

The district court denied the father's request for an evidentiary hearing to establish the existence of the parents' agreement to raise the children in Brazil. The court expressed doubts about whether newborns can acquire a habitual residence and concluded that even if this were possible, the children's habitual residence would not be Brazil.

Discussion

Affirming the district court's judgment, the Tenth Circuit reiterated the principle that when habitual residence is challenged, the reviewing court need not determine where the child

is habitually resident, but rather only *whether* the child is a habitual resident of the country claimed by the petitioner.[1]

The lower court rendered its decision before *Monasky v. Taglieri*,[2] but the Tenth Circuit found that the ruling was consistent with the totality-of-circumstances test outlined in *Monasky*. The district court had considered the facts surrounding the birth of the children, the mother's move to the United States, the absence of a written parental agreement, and the fact that the twins were never physically present in Brazil.

The Tenth Circuit also reviewed the father's argument that he was denied due process because the district court failed to conduct the requested evidentiary hearing on the existence of an agreement between the parents about where the children would be raised. The court found no error, noting the district court's "substantial degree of discretion in determining the procedures necessary to resolve a [Hague Convention] petition," and citing its decision in *West v. Dobrev*.[3]

1. Pope v. Lunday, No. 20-6003, 2020 U.S. App. LEXIS 36618, at *4 (10th Cir. Nov. 20, 2020) (quoting Watts v. Watts, 935 F.3d 1138, 1147–48 (10th Cir. 2019): "The Convention does not require a district court to determine *where* a child habitually resides. Instead, the Convention requires a district court to determine *whether* the child habitually resides in the location that the petitioner claims. If the child habitually resides there, the Convention demands that the court determine whether the child's removal from that location was wrongful.").

2. 140 S. Ct. 719 (2020).

3. *Pope*, 2020 U.S. App. LEXIS 36618, at *9–*10 (quoting West v. Dobrev, 735 F.3d 921, 929, 932 (10th Cir. 2013): "[N]either the Convention nor ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires that discovery be allowed or that an evidentiary hearing be conducted as a matter of right in cases arising under the Convention.". . . Rather, "a meaningful opportunity to be heard . . . is all due process requires in the context of a Hague Convention petition.").